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No. 94-394

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TRANSPHASE SYSTEMS, INC.,

Petitioner,

v.

SOUTHERN CALIFORNIA EDISON COMPANY
AND SAN DIEGO GAS AND ELECTRIC COMPANY,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Walter D. Ames
1400 K. Street, N.W.
Suite 1000
Washington, D.C. 20005-2477
(202)628-0088
Counsel for Petitioner

September 1, 1994

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I. QUESTIONS PRESENTED

1. Is the "state action" doctrine, as enunciated in Parker v. Brown, 317 U.S. 341 (1943) and its progeny, available to provide immunity to an electric utility or other private corporation that monopolizes a market in violation of Section 2 of the Sherman Act?

2. If "state action" immunity is available, then under the first-prong of the Midcal test, does State legislative authorization to regulate supersede recent and affirmative legislative enactments promoting competition in the relevant market, thereby enabling a state regulatory agency alone to immunize a corporation from federal antitrust law?

3. Under Midcal's second-prong, where the issue is the actuality of price-setting and control by the regulators, should a district court convert defendants' motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., to a motion for summary judgment as plaintiff moved to allow the parties to establish a record on disputed issues of fact, in accordance with Rule 12(b), Fed.R.Civ.P. and Rule 201(b), Fed.R.Evid?

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Cal. Pub. Util. Code § 747 . . . 4,27, App. 21a-22a

Cal. Pub. Util. Code § 454(a) . . 4,15,27, App. 23a

Cal. Pub. Util. Code § 701.1(c) . . 4,28, App. 24a-25a

OTHER AUTHORITY

Areeda and Hovenkamp, Antitrust Law, 1993 Supplement, Little, Brown and Company 20

Transphase Systems, Inc. ("Transphase") hereby petitions the Supreme Court of the United States for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.[1]

III. ORDERS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit is found in the appendix at 1a to 2a. The Order of the United States District Court for the Central District of California is included in the appendix at 3a-17a. The Court of Appeal's order denying petitioner's rehearing motion, with petitioner's suggestion for rehearing in banc, is included in the appendix at 18a to 19a.

IV. JURISDICTION

The Court of Appeals rendered its judgment on May 9, 1994. A petition for rehearing was denied on June 9, 1994. This court has jurisdiction under 28 U.S.C. §1254(1).

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[1]Transphase Systems, Inc. has no parent or subsidiary corporations. All parties to the proceeding appear in the caption to the case.

V. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional and Federal Statutory Provisions (Question 1)

Constitution of the United States, Article VI:
Clause 2. Supreme Law

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Sherman Act, Title 15 United States Code §1 and 2:

Section 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal...

Section 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, §1, 2, 26 Stat. 209; As amended Nov. 16, 1990, P.L. 101-588, §4(b), 104 Stat. 2880.)

Title 15 U.S.C. Section 15: Suits by persons injured.

...[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or if found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

B. California Statutory Provisions (Question 2)

Chapter 984, California Statutes of 1983:

The Legislature finds and declares it is in the best interest of the state to ensure competition in the energy conservation industry because of the innovation, price competition, aggressive marketing, and freedom of entry which characterize competitive industries, and that the energy conservation industry, because of its decentralized nature, has the potential to be truly competitive.

The Legislature further finds and declares that the current uncertainty with regard to the role of electrical and gas corporations subject to regulation as public utilities by the Public Utilities Commission with regard to energy conservation development hinders the full-scale development of the energy conservation industry, and therefore requires legislative clarification.

The Legislature further finds and declares that there may be an inherent conflict for a public utility which furnishes gas

and electricity on the one hand and installs energy conservation materials or devices on the other hand, and that it would be detrimental to the energy industry and to the state if privately-owned public utilities used their status as monopolies to dominate the energy conservation industry or exercise unfair market power.

The Legislature further finds and declares that the basis for regulation of public utilities extends to their participation in energy conservation development as well as in the production and delivery of forms of energy derived from conventional sources.

It is, therefore, the intent of the Legislature that the Public Utilities Commission be given a clear and explicit mandate to regulate the involvement of electrical and gas corporations in energy conservation development, and to ensure that the energy conservation industry develops in a manner which is competitive and free from the potential dominance of regulated electrical and gas corporations.

Other California Legislative Enactments In Appendix:

California Public Utilities Code §744.7(e)	App. 20a
Chapter 1369, California Statutes of 1990 (Incorporates California Public Utilities Code §747)	App. 21a-22a App. 21a-22a
California Public Utilities Code §454(a)	App. 23a
California Public Utilities Code §701.1(c)	App. 24a-25a

VI. STATEMENT

A. Limitation of Petition to "State Action" Doctrine

On May 3, 1993, Transphase filed a private antitrust action against Southern California Edison Company ("SCE") and San Diego Gas and Electric Company ("SDG&E") in the United States District Court for the Central District of California. The complaint charged the utilities with monopolizing and attempting to monopolize the distribution of energy efficiency services to ratepayers and thermal energy storage ("TES") equipment installed at host customer facilities, in violation of the Sherman Act, §2 (15 U.S.C. §2), among other antitrust counts. As prayers for relief, Transphase's Complaint sought monetary damages under 15 U.S.C. §15 and injunctive relief. The district court had jurisdiction in this action under 28 U.S.C. §1331 (federal question jurisdiction).

On June 14, 1993, SCE and SDG&E filed motions to dismiss the complaint under Federal Rule 12 (b)(6) for "failure to state a claim upon which relief can be granted". The utilities argued, inter alia, that they were immunized from federal antitrust liability under both the "state action" and Noerr-Pennington doctrines. Transphase opposed the defendants' arguments in reliance on Cantor v. Detroit Edison Co.,428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) and express statutory intent promoting competition in the relevant markets. Transphase also moved the District Court to convert the Rule 12(b)(6) motion to a motion for summary judgement on Midcal's second prong and on July 9, 1993, submitted evidence to show lack of active regulatory supervision.

On October 12, 1993, the District Court entered final

judgment granting the defendants' motions to dismiss with prejudice. App. 3a to 17a. The lower court found state-action and Noerr-Pennington immunities for all of SCE and SDG&E's energy efficiency activities. The District Court also dismissed Transphase's complaint on the basis that it did not adequately allege to be a significant competitor of the utilities, although indicating that it would have allowed Transphase to re-plead if the immunity doctrines were not available. App. 16a, n. 10.

Transphase limited its appeal to the U.S. Ninth Circuit Court of Appeals to its Section 2 claims of actual and attempted monopolization as well as a pendent state claim. In a one-sentence decision filed May 9, 1994, the Ninth Circuit affirmed the District Court's dismissal of the case, but limited its basis of affirmance to the District Court's discussion of the "state action" doctrine enunciated in Parker v. Brown, 317 U.S. 341 (1943) and its progeny. App. 1a-2a. On June 9, 1994, the Ninth Circuit denied Transphase's petition for rehearing with a suggestion for rehearing en banc. App. 18a-19a.

Because the Ninth Circuit expressly limited the dismissal to the state-action doctrine, the questions presented in this petition solely concern this doctrine's availability and application to defendant private corporations.

B. The Utilities' Control and Destruction of Energy Efficiency Services and Products

As competitors to Transphase in the provision of electric capacity to the ratepayers, defendants SCE and SDG&E - not the California Public Utilities Commission ("CPUC") - (1) control the price paid to Transphase for the electric capacity and energy savings it provides, and (2) use

this power to destroy the energy efficiency services and equipment markets, to the massive financial detriment of the ratepayers.

Transphase sells electric capacity and energy savings, also known as energy efficiency or demand-side management ("DSM") resources. Transphase provides electric capacity and energy savings through the manufacture, installation and operation of a patented thermal energy storage ("TES") system. The system is typically installed as a retrofit to existing central cooling plants which provide air conditioning and/or process cooling in larger commercial and industrial facilities, such as hospitals, colleges, manufacturing facilities, and office buildings. The system stores cooling capacity during nighttime off-peak electric hours and releases the stored cooling capacity during daytime on-peak hours. In this way, the cooling plant's electricity consumption is shifted from daytime on-peak hours to nighttime off-peak hours. As noted in SCE's own 1993 TES brochure to host customers, "[i]f you shift your energy intensive cooling operation to Edison's off-peak period, the peak demand is reduced, you pay a lower rate, and we can defer constructing new power plants to meet peak demands, keeping rates lower overall."

Across the country, electric utilities receive over $2 billion per year from their ratepayers for the provision of energy efficiency services, also known as load management or energy conservation resources. The defendants in this case alone receive over $150 million per year for the distribution and provision of energy efficiency resources. They collect these funds through the electricity bills paid by all the ratepayers in their service territories. In a manner

analogous to the light-bulb exchange program in Cantor, supra, 428 U.S. at 582, 96 S.Ct. at 3114, the ratepayers "are billed for the electricity they consume, but pay no separate charge..." for the energy efficiency resources. The utilities in turn use the $150 million per year to purchase energy efficiency resources from either the DSM providers such as Transphase, or the host facility owner where the DSM measure is installed, as well as on exorbitant internal administrative costs and paper studies.

The prices that the utilities pay for the energy efficiency services are constituted on the basis of rebates and avoided costs. The utilities have the full authority from state regulators to set these prices at any level they choose within broad limits under the CPUC's "Total Resource Cost" test. The rebate price (on a dollars per kilowatt basis) determines the ratepayers' remuneration to Transphase for the electric capacity it provides and the economic payback period to the host customer considering the installation of a DSM measure. Over the course of the last few years, SCE has varied the price for electric capacity from TES systems from $0 to $600 per kilowatt ("kw") (now set at $0 per kw), while SDG&E has varied its price from $0 to $300 per kw (also now set at $0 per kw). In comparison, SCE and SDG&E have received up to $1500 per kw for distributing Transphase's DSM-based electric capacity to the ratepayers and up to $6000 per kw for distributing electric capacity from new power plants to the ratepayers.

As the term implies, "avoided costs" are the marginal costs displaced by not building power plants and generating electricity. Such avoided costs represent the total maximum price that may be paid for energy efficiency resources under

the CPUC's Total Resource Cost test. The utilities in fact set DSM avoided costs at far lower rates than those set for supply-side costs, but even if they did set DSM avoided costs equal to supply-side costs, the utilities would still have total power to manipulate energy efficiency rebate prices to control the DSM market.[2]

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[2]As an example, SCE lists its avoided cost or "benchmark price" for repowering its San Bernardino power plant at $1350 per kw. When one includes transmission and distribution costs, assume this equivalent avoided cost for comparison with DSM resources is $1500 per kw. Under the CPUC's Total Resource Cost ("TRC") cost effectiveness test, any DSM resource under $1500 per kw is cost-effective, in that its cost is less than the cost of the equivalent supply-side resource.

Under this example, the rebate price could be $1000 per kw and the host contribution $0 per kw, or the rebate price could be $200 per kw and the host contribution $800 per kw. In either case, from the CPUC's perspective, the total cost of the DSM resource would be the same ($1,000 per kw) and the cost-effectiveness of the DSM resource, under the CPUC's TRC test, would be exactly the same.

But obviously, the significance of these two rebate price scenarios is that, under the first scenario ($1,000 per kw rebate and $0 per kw host contribution), the payback period to the host is immediate because the host has no investment and only electric bill savings. The potential market under this scenario is enormous, in that no cognizant host would refuse such an offer from a legitimate seller is proven applicable technology. Under the second scenario, ($200 per kw rebate and $800 per kw host customer payment), the payback on the host-customer's $800 per kw investment might be 7 years, i.e. electric bill savings of $114 per kw per year. At this payback, the market potential might be essentially zero - in other words, few or no hosts would purchase the DSM system at a 7 year payback.

This example assumes only capacity impacts, with no energy

By controlling the price per kilowatt that Transphase receives to between 0 and 20% of what the utility receives, SCE and SDG&E have choked off the supply of energy efficiency resources to the ratepayers. In the process, the utilities are seriously damaging the ratepayers, as well as putting Transphase and dozens of other companies out of business, by distorting the marketplace to far-higher priced new power plants and more expensive (and increasingly unavailable) energy efficiency resources distributed directly by themselves.

VII. REASONS FOR GRANTING THIS PETITION

A. Summary of Reasons: Inter-Circuit Conflict and The Ninth Circuit's Conflict with the Supreme Court

In affirming the dismissal of Transphase's Original Complaint without leave to amend under Federal Rule 12(b)(6), the Ninth Circuit held that no claim or set of facts had been or could be pleaded that would constitute a violation of Section 2 of the Sherman Act because "defendants SCE and SDG&E in Transphase's complaint are immunized from federal antitrust liability by the 'state action' doctrine."[3] App. 1a-2a, District Court Order, App.

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impacts. In reality, the Transphase System generates substantial energy savings as well because power plants operating during nighttime base-load conditions are far more energy efficient than daytime "peaking" power plants.

[3]Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957): "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove

11a. This conclusion - that the judiciary can grant sweeping immunity to corporations from federal antitrust law under the "runaway" federal common law known as the "state action" doctrine - directly and unambiguously conflicts with decisions of other United States Courts of Appeals and of this Supreme Court.[4]

Question 1 Summary: In Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990), cert. denied, 499 U.S. 931 (1991), the First Circuit (BREYER, J.) held, in a case involving comprehensively regulated electric rates, that "state action" immunity was unavailable:

> The basic legal principles that govern this monopolization case are well settled. Even though Boston Edison is a regulated firm, it has no blanket immunity from the antitrust laws. See Otter Tail Power Co. v. United States, 410 U.S. 366, 372-75, 93 S.Ct. 1022, 1027-28, 35 L.Ed.2d 359 (1973); see also Cantor v. Detroit Edison, 428 U.S. 579, 596 n. 35, 96 S.Ct. 3110, 3120 n. 35, 49 L.Ed.2d 1141 (1976)...To prove a violation of this statute (Sherman Act §2), a plaintiff must demonstrate (1) that the defendant possesses monopoly power in the relevant market, and (2) that the defendant has acquired or maintained that power by

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no set of facts in support of his claim which would entitle him to relief."

[4]The term "runaway" was used in O'Melveny & Myers v. F.D.I.C. _ U.S. _, 114 S.Ct. 2048, 2055 (1994) (SCALIA, J.) to demonstrate "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."

improper means. (internal quotation marks and citations omitted).

Thus, the First Circuit found no state-action or other regulatory exemption from federal law to be available and that the correct inquiry was whether in fact the defendant utility corporation had violated Section 2 of the Sherman Act.

In similarly rejecting the availability of the state-action doctrine to a state-regulated electric utility corporation, the Seventh and Eighth Circuits quoted from exactly the same passage in Cantor, supra, (STEVENS, J.) that the First Circuit had cited:

> **[T]here can be no doubt about the proposition that the federal antitrust laws are applicable to electric utilities. Cantor, supra, 428 U.S. at 596, n. 35, 96 S.Ct. at 3120.**

City of Mishawaka, Indiana v. Indiana & Michigan Electric Co., 560 F.2d 1314, 1321 (7th Cir. 1977) cert. denied, 436 U.S. 922 (1978) (Mishawaka I); City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1177 (8th Cir. 1982), cert. denied, 495 U.S. 1170 (1983). See also City of Mishawaka, Indiana v. American Electric Power Company, Inc., 616 F.2d 976, 985 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981) (Mishawaka II): ("Parker v. Brown is inapposite" to defendant electric utility corporation.)

In diametrical contrast, the Ninth Circuit in the case at bar and the Third Circuit almost simultaneously in Yeager's Fuel, et. al. v. Pennsylvania Power & Light, 22 F.3d 1260 (3rd Cir. 1994), found that the judicially-created Parker state-action immunity defense can and should be expansively

applied to find that the federal antitrust laws do not apply to investor-owned electric utility corporations, discarding any inquiry into whether the utility had actually violated Section 2 of the Sherman Act.

In so doing, both the Ninth and Third Circuits grossly misconstrued and misapplied the Supreme Court's decision in City of Columbia v. Omni Outdoor Advertising, Inc., 449 U.S. 365, 111 S.Ct. 1344 (1991) (SCALIA, J.) Both circuit courts relied on Omni's state-action standard applied to municipalities to grant immunity to a private utility corporation. App.7a. 22 F.3d at 1267, n. 8. To the exact contrary, Omni, supra, held that Parker immunity is only available to the subordinate state entity, and simultaneously rejected the availability of this doctrine to regulated corporations. Id, 449 U.S. at 379, 111 S.Ct. at 1353.

The defendant investor-owned utility corporations - not the CPUC - monopolize the energy efficiency equipment and services markets, a marketplace where no natural monopoly exists (unlike perhaps the transmission and distribution of electricity) which might thereby preclude exclusionary conduct required to sustain a Section 2 monopolization claim. See Cantor supra, 428 U.S. at 595, 96 S.Ct. at 3120. See Town of Concord, supra., 915 F.2d at 26. Because Congress never intended there to be an implied exemption or repeal for electric utilities from Section 2 of the Sherman Act, see Otter Tail, Cantor, supra, a state or its regulators cannot immunize these corporations from federal law without conflict with the Supremacy Clause of the U.S. Constitution.

As an analysis of first impression, this Court has never clearly delineated between the impropriety of applying the

state-action doctrine to a Section 2 monopolization case against a private corporation, wherein its application amounts to a recision of federal law by judicial fiat, and the appropriate availability of the state-action doctrine to Section 1 conspiracies in restraint of trade, wherein the state's action in setting rates might literally obviate the private price-fixing conspiracy. The case at bar, Cantor, Otter Tail, and the other five Circuit Court cases referenced supra, are all Section 2 monopolization cases against investor-owned electric utilities. Parker, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed. 233 (1980), Southern Motor Carriers Rate Conf. v. U.S., 471 U.S. 98, 105 S.Ct. 1721, 85 L.Ed. 36 (1985) and F.T.C. v. Ticor Title Ins. Co., _ U.S. _, 112 S.Ct. 2169 (1992), relied on by the Ninth and Third Circuit courts, were all Section 1 price-fixing cases. As a result, the Circuit Courts have criss-crossed Supreme Court precedent and remain in a state of conflict concerning the availability of state-action immunity to a §2 monopolization claim against a private corporation.

In FTC v. Ticor, 112 S.Ct. at 2181, this Court's most recent §1 price-fixing case that applied the doctrine but denied the immunity, Justice Scalia went further in his concurring opinion: "I am skeptical about the Parker v. Brown exemption for state-programmed private collusion in the first place."

Question 2 Summary: In creating an exemption for electric utilities from federal law, the Ninth and Third Circuit courts held that a basic authorization to regulate is all that is required from the State Legislature under the first prong of the two-pronged test enunciated in Midcal, supra.

The courts of the Ninth and Third Circuits turned to the state PUC to establish state policy to displace competition and preempt federal antitrust law, again directly at odds to Supreme Court precedent, including So. Motor Carriers, supra, 471 U.S. at 62, 63, 105 S.Ct. at 1729, 1730.

Unlike the Pennsylvania Legislature in Yeager's Fuel, supra, however, in this case the California Legislature provided a repeated and clarion call for competition - not utility monopolization - in the relevant energy efficiency marketplace. California commanded that "...the energy conservation industry develops in a manner which is competitive and free from the potential dominance of electrical and gas corporations" (Chapter 984, 1983, supra. at p. 3, 4); that energy efficiency resources be allowed "an opportunity to compete on a fair and reasonable basis with generating resources to fulfill future utility resource needs" (Chapter 1369, §1(b), 1990, App. 21a); and, while rejecting SCE's lobbying for antitrust immunity, reaffirmed Chapter 984 "to promote a competitive marketplace for energy efficiency equipment and services." (Cal. Pub. Util. Code, §744.7(e), 1993, App. 20a).

Incredibly, the Ninth Circuit's affirmance relied upon Cal. Pub. Util. Code §454(a) (App. 23a), a statute dating back to 1915 which authorizes the CPUC to regulate electric rates, as establishing the Legislature's clearly articulated, affirmatively expressed intent to displace competition required under the first-prong of the Midcal test. App. 10a. By relying on basic authority to regulate rather than on the Legislature's repeated, express intent to promote competition in energy efficiency, the Ninth Circuit effectively read Midcal's first-prong out of existence for any state-regulated

corporation because by definition the State will have authorized an agency to regulate the corporation.

Question 3 Summary: Under the second prong of the Midcal test, where the factual issue of control turns on whether the CPUC actually established the energy efficiency rebate prices offered by the defendants in the marketplace, the district court took judicial notice of more than 300 pages of CPUC documents submitted with SCE's Motion to Dismiss under Federal Rule 12(b)(6). In direct conflict with the District Court in Yeager's Fuel, however, in this case the District Court denied Transphase's Motion to convert the 12(b)(6) Motion to a Rule 56 Motion for Summary Judgment, as mandated in Rule 12(b), Fed.R.Civ.Proc., so that Transphase could have the District Court consider its submission of publicly available documents showing lack of supervision or control by the regulators over the utilities' actual price-setting of energy efficiency services in the marketplace. App. 8a-9a, n. 5. The Ninth Circuit's affirmance also violated Rule 201(b), Fed.R. of Evid., by wrongfully taking judicial notice of alleged CPUC control - defendants' purported fact that Transphase vigorously disputes and could prove erroneous if the Court considered its submitted material.

The legal and economic implications of this case are enormous. The federal judiciary cannot create an exemption from federal law for a certain class of corporations. The Supremacy Clause of the U.S. Constitution, Supreme Court case law, the state statutes and factual evidence cannot be ignored, as the Ninth Circuit did. Utility ratepayers, like any other consumers, should be afforded the economic advantages of competition in markets where no natural

monopoly exists. To resolve the "state action" doctrine and bring uniformity to widely disparate Circuit Court interpretations, the Supreme Court should grant this petition for Certiorari.

B. Question 1: The First and Seventh Circuits And this Court Have Found the State Action Doctrine Not Available to Immunize A Private Corporation's Monopolization In Violation of Federal Law.

The Ninth Circuit affirmed the dismissal of Transphase's complaint against two investor-owned corporations based on the state-action doctrine first enunciated in Parker v. Brown, supra, in the process straying dramatically from the doctrine announced in Parker v. Brown itself. This Court held that the Sherman Act was not intended to "restrain a state or its officers or agents from activities directed by its legislature." Parker, 317 U.S. at 350, 351, 63 S.Ct. at 313. In contrast, this Court found that based on its legislative history, "[t]he [Sherman] Act is applicable to "persons" including corporations...That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." Id.

In misapplying the state-action doctrine to private corporations, both the Ninth Circuit in the case at bar, and the Third-Circuit in Yeager's Fuel, supra, relied upon Parker's progeny, specifically Omni Outdoor Advertising and the principles of federalism and state sovereignty expressed therein. App. 7a, 22 F.3d at 1267, n. 8. In so doing, these Courts of Appeals were blind to the sharp

distinction drawn in both Omni Outdoor Advertising, supra, and Parker v. Brown between the doctrine appropriately applied to subordinate state entities (e.g. a municipality) and its total inapplicability to a regulated corporation. In Omni, 449 U.S. at 379, 111 S.Ct. at 1353, this Court held:

> This does not mean, of course, that the States may exempt private action from the scope of the Sherman Act; we in no way qualify the well established principle that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." Parker, 317 U.S., at 351, 68 S.Ct., at 314 (citing Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-347, 24 S.Ct. 436, 459-461, 48 L.Ed. 679 (1904)). See also Schwegmann Brothers v.Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951)[5]

This statement was not dicta. The Supreme Court refused to apply the state-action immunity doctrine to the defendant regulated bill-board corporation while simultaneously finding immunity for the co-defendant municipality.

The only way to avoid obvious conflict between the state-action doctrine applied to private conduct and the Supremacy Clause - in that this doctrine provides the State

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[5]Emphasis in original. Compare this citation, written for the Court by Justice Scalia, to his concurring opinion in FTC v. Ticor, "[O]ur active supervision doctrine...has not been challenged here, and...I am skeptical about the Parker v. Brown exemption for state-programmed private collusion in the first place." 112 S.Ct. at 2181.

Legislature and PUC with preemptive, immunizing power over §2 of the Sherman Act - would be if Congress had included an implied exemption to the law. However, the Courts have forcefully answered that Congress has never implied an exemption for regulated corporations from the Sherman Act, even with subsequent federal regulatory statutes. See Otter Tail and Cantor, supra as cited in Town of Concord, City of Mishawaka I, City of Mishawaka II, City of Kirkwood, supra.

In stark contrast, the Ninth Circuit in this case judicially-extended a federal common law doctrine to exempt private corporations from federal statute - an immunity so broad that the Ninth Circuit could dispose of the case in one sentence for an inability to state a cause of action. App. 1a-2a. However, the federal judiciary has no authority of any sort to exempt private corporations from federal law intended to apply to such corporations, regardless of state intent.

"In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision." O'Melveny & Myers, supra, 114 S.Ct. at 2054. No federal policy or legislative history exists intending to exempt corporations from the Sherman Act, as is clear from Parker, Otter Tail and Cantor, supra. The Ninth Circuit's declaration of the electric utilities' immunity from federal law is, as described in another context by this Court, "positively probative of the dangers of (this) facile approach to federal-common-law-making" and "demonstrates the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." O'Melveny & Myers, 114 S.Ct. at 2055.

Facially, the application of Parker immunity to private parties can be ascribed to the Supreme Court, in particular to its application of the Midcal test in FTC v. Ticor and So. Motor Carriers, supra. However, the seminal state-action Supreme Court cases of Parker, Midcal, So. Motor Carriers and FTC v. Ticor all involved Sherman Act §1 price fixing schemes involving raisins, liquor, trucking and title insurance rates, respectively. The "state action" doctrine applied to §1 price-fixing and the Sherman Act are not inconsistent standards. If the State, through its laws and regulations establishes rates or prices, individual private parties are not colluding to fix prices by simply following those state dictates. As discussed in Areeda and Hovenkamp, Antitrust Law, 1993 Supplement, ¶209.2, "Preemption and Parker State Action Exemption: Same Issue?" p. 107, "[i]n Midcal, for example, the California statute requiring suppliers to state a resale price and dealers to charge that price was preempted, but neither suppliers nor dealers had agreed about resale prices and therefore neither had violated the Sherman Act."

Section 2 actual or attempted monopolization is fundamentally different from §1 price-fixing offenses.[6] A private corporation cannot monopolize a market without violating the offense specified in §2 of the Sherman Act, regardless of whether the private party's conduct is sanctioned by the State or not. The application of the state-action doctrine to a §2 monopolization claim against a private party inherently sets the State's action as preemptive of federal law, which must conflict with the Supremacy

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[6]Section 2's "conspiracy to monopolize" element is excluded for the purposes of this analysis.

Clause.

In applying the judicially-created state-action doctrine to monopolization claims against corporations, the Ninth and Third Circuits have afforded state regulators far greater preemptive authority over the Sherman Act than the judiciary affords federal regulatory programs. Indeed, there is no analogous immunity doctrine to private parties' claims that federal regulatory programs supersede federal antitrust law. "There is nothing in the legislative history (of the Federal Power Act) which reveals a purpose to insulate electric power companies from the operation of the antitrust laws...." Otter Tail, supra, 410 U.S. at 373-374, 93 S.Ct. at 1028.

In Cantor, supra, 428 U.S. at 596, 597, 96 S.Ct. at 3120, 3121, this Court clearly recognized that state regulators held no special preemptive power:

> Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws...[T]he standards for ascertaining the existence of and scope of such an exemption must be at least as severe as those applied to federal regulatory legislation.

In Cantor's holding that the Parker immunity doctrine was not available to a state-regulated electric utility, the Supreme Court emphasized that since a natural monopoly did not exist in the challenged market, the federal antitrust laws apply with full force:

> There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent it engages in business activity in competitive areas of the

> economy. Thus, Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards. Id., 428 U.S. at 596, 96 S.Ct. at 3120.

There can be no doubt that a natural monopoly does not exist in the energy efficiency marketplace. As the California Legislature recognized in Chapter 984, Statutes of 1983, supra at 3, 4:

> The Legislature finds and declares it is in the best interest of the state to ensure competition in the energy conservation industry because of the innovation, price competition, aggressive marketing and freedom of entry which characterize competitive industries, and that the energy conservation industry, because of its decentralized nature, has the potential to be truly competitive." (emphasis added).

Extending this principle from Cantor, the First Circuit held that where a natural monopoly did exist (in the distribution of electricity) no exclusionary conduct could be found. "Local electricity distribution, after all, is itself considered a "natural monopoly" with service typically provided by a single franchised company to relatively immobile customers." Town of Concord, supra, 915 F.2d at 26.

While Cantor was heavily relied on by Transphase, the Ninth Circuit and District Court Orders would not mention it, and in the Third Circuit its viability was openly questioned. 22 F.3d at 1260. But the Supreme Court in FTC v. Ticor, 112 S.Ct. at 2178, reaffirmed it: "Michigan may regulate its electric utilities without authorizing monopolization in the market for electric light bulbs." And

the First and Seventh Circuits, supra, cited Cantor as the reason not to consider a state-action immunity analysis.

Rather than, as here, immunize an electric utility from a charge of monopolization, courts have typically applied the rigorous elements of a monopolization claim to the utility corporation's conduct: (1) monopoly power in a relevant market, that is, the power to control price or exclude competition: and (2) exclusionary conduct with no legitimate business justification, specifically whether or not the utilities' actions benefitted or were at the expense of the consumers (ratepayers). See, for example, Town of Concord, 915 F.2d at 21. In that "price-squeeze"case, the defendant investor-owned electric utility had a legitimate business justification for not lowering the wholesale rates to the plaintiff municipal utility monopoly - such action would increase retail electric rates, thus damaging the ratepayers. "Indeed, the rule would encourage Edison to seek a retail rate increase so high that a jury could not find the wholesale/retail gap too narrow." Id. at 27.

In the case at bar, the utilities have no legitimate business justification for their predatory and exclusionary conduct. It is SCE and SDG&E - not the state PUC - that controls energy efficiency prices so that competitors such as Transphase receive financial consideration at between 0% and 20% of the prices paid for generation resources, and at substantially lower prices than the utility receives from ratepayers for its own energy efficiency programs. Allowing energy efficiency resource prices to adjust to market prices would increase the supply and demand for such measures in the marketplace, which would in turn reduce the need for new and far more expensive power plants. By choking off

the supply of energy efficiency equipment and the electric capacity and energy savings this equipment provides, the utilities are distorting the marketplace to far higher priced power plants and to their own excessively expensive (and increasingly unavailable) energy efficiency programs, thus damaging their ratepayers. The omnipotent utilities have completely impaired the opportunity of Transphase to compete on the merits, thus willfully acquiring and maintaining their monopoly power.

Transphase can state a claim that the defendants in this case have violated Section 2 of the Sherman Act. The federal judiciary, the state legislature, and/or the state PUC should not be permitted to exempt the defendants from that federal law.

C. Question 2: The Ninth Circuit's Reliance on Legislative Authorization to Regulate Conflicts With this Court's Requirement that the State Legislature Intend to Suppress Competition.

Even if the judicially-created state action doctrine could potentially exempt the defendants from federal antitrust law, the utilities in the case at bar fail both prongs of the Midcal test for state-action immunity. Midcal, 445 U.S. at 106, 100 S.Ct. at 943. While addressing a §1 price-fixing conspiracy claim subject to state-action, the Supreme Court recently held: "For States which do choose to displace the free market with regulation, our insistence on real compliance with both prongs of the Midcal test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control." FTC v. Ticor, 112 S.Ct. at 2178. On the first-prong, the Ninth Circuit and District Courts refused to mention the repeated and recent

California legislation that strongly promotes competition in the relevant energy efficiency services and equipment marketplace. Instead the Ninth Circuit affirmed a dismissal which relied on general PUC authority to regulate utilities' rates - found in a statute dating back to 1915 - and a similar PUC authority to regulate the utilities' energy efficiency programs. App. 9a-10a.

Midcal's first prong focus is squarely on the Legislature's competitive intent, not simply whether there is an authority to regulate. "Besides authority to regulate,... the Parker defense also requires authority to suppress competition - more specifically, clear articulation of a state policy to authorize anticompetitive conduct..." Omni, 449 U.S. at 372, 111 S.Ct. at 1350. (internal quotation marks and citations omitted.) Indeed, the issue cannot be whether the regulatory agency is acting in accordance with statutory authority, for that is a question of state law that has nothing to do with whether private corporations are violating federal antitrust law. Id. at 372, 111 S.Ct. at 1349, 1350. The Ninth Circuit's equation of authority to regulate with intent to suppress competition would eviscerate Midcal's first prong because by definition the State Legislature has authorized its agency to regulate the private parties. By nullifying Midcal's first prong, the Ninth Circuit effectively left it to the state PUC to establish competitive intent and have its regulatory decisions preempt federal law.[7]

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[7]Because Town of Concord, Mishawaka I, and Mishawaka II, supra declined to find the Parker doctrine an applicable defense to the challenged state-regulated retail electric rates, these cases did not comment on the respective State's legislative intent. Superfluously, the Eighth Circuit in City of Kirkwood, supra,

Southern Motor Carriers also addressed this principle that the anticompetitive intent must come from the State Legislature, not the State PUC at 471 U.S. at 62, 63, 105 S.Ct. at 1729, 1730:

> The Public Service Commissions...permit collective ratemaking. Acting alone, however, these agencies could not immunize private anticompetitive conduct...*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature...or a State Supreme Court. (citations omitted).

Thus, the lower courts' reliance on broad authorization from the state legislature, and specific reliance in Yeager's Fuel on an unpublished report of a bureau of the PUC, 22 F.3d at 1268, 1269, directly conflict with Omni Outdoor Advertising and So. Motor Carriers. The courts below should not allow subordinate state agencies to wield a "FEDERAL LAW PREEMPTED" seal.

Unlike the permissive Pennsylvania statutory framework found in Yeager's Fuel, however, in this case the California Legislature explicitly and repeatedly promotes competition in this sector of the economy, including an express denial of state-action immunity to SCE in energy efficiency equipment and services less than one year ago. In Public Utilities Code 744.7(e), 1993, the Legislature reaffirmed its prior policies "to promote a competitive marketplace for energy efficiency

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found that not only did Cantor preclude the availability of the state-action doctrine, but that the electric utility satisfied neither prong of the Midcal test. 671 F.2d at 1180, n. 15.

equipment and services." App. 20a. In this 1993 Code, the Legislature explicitly reaffirmed Chapter 984, Statutes 1983, supra, p. 3-4, in which the Legislature commanded that "...the energy conservation industry develops in a manner which is competitive and free from the potential dominance of regulated electrical and gas corporations." (emphasis added) In Chapter 1369(§1b), 1990, the Legislature declared that energy efficiency resources be allowed "an opportunity to compete on a fair and reasonable basis with generating resources to fulfill future resource needs" and in Section 3 thereof (PU Code 747) went on to demand that specific bidding systems be tested quickly. App. 21a-22a. Time and again California has demanded competition with administrative oversight to be provided by state regulators.

Instead of discussing these enactments, the Ninth Circuit affirmed the District Court's Midcal first prong discussion, which quotes PU Code §454(a), a statute dating back to 1915 that has nothing to do with energy efficiency rebate prices but authorizes the CPUC to regulate electric rates. App. 23a. Such broad regulation surely does not show Legislative intent to suppress competition in energy efficiency, but that is precisely what the Ninth Circuit affirmed. Also, without noting that PU Code 747 is section 3 of the above-quoted, strongly pro-competitive Chapter 1369, it erroneously relied on this code section as having an anticompetitive intent when the competitive bidding program it creates is an attempt to spur, rather than displace competition. App. 21a, 22a. Indeed, the lower court's reliance on PU Code 747's establishment of DSM bidding pilots to demonstrate intent to limit competition was starkly contradicted by the California Legislature's PU Code 744.7(e) allowing "a competitive bidding process for all or any part of the work to be

performed under these (energy efficiency) programs." App. 20a. The district court also mentioned PU Code 701.1(c), 1990 (App. 24a-25a), which again promotes - not displaces - comparison and competition between energy efficiency and generation resources by including environmental costs in any cost-effectiveness calculation.

If authority to regulate equates with intent to suppress competition where the Legislature expressly seeks to promote competition, the first prong of the Midcal test will have been interpreted out of existence.

D. Question 3: The District Court's Refusal to Convert The Rule 12(b)(6) Motion to a Motion for Summary Judgement Conflicts With Rule 12(b), Evidence Rule 201(b) and the Third Circuit.

To satisfy Midcal's second prong, SCE and SDG&E each have the burden to prove: (1) that the CPUC ordered the specific energy efficiency rebate prices as well as other anticompetitive acts complained of by Transphase, (2) the CPUC ordered such a scheme only after a substantial examination, and (3) that the actual prices and conduct carried out by the defendants complied with the CPUC orders. FTC v. Ticor, 112 S.Ct. at 2177 and 2179. See also Patrick v. Burget, 486 U.S. 94, 102, 108 S.Ct. 1658, 1663 (1988). (Active supervision requirement not met where state did not "exer[t] any significant control" over the restraint. "The mere presence of some state involvement or monitoring does not suffice.")

Just what the CPUC did to actively supervise and control the acts complained of is an issue of fact. While the District Court may take judicial notice of the 300-plus pages

of CPUC decisions submitted by SCE under Federal Rules of Evidence 201 (c) and (d), Transphase vigorously contests that CPUC decisions are factually determinative as to CPUC control. Indeed, Transphase alleges that even if the CPUC documents specified the energy efficiency prices (which they do not), the utilities were not in compliance with these hypothetical rate orders. Thus, the CPUC documents cannot factually in and of themselves answer the question of whether the CPUC controls the prices complained of.

In a motion to dismiss, the court must determine whether it appears beyond doubt that the plaintiff could prove no set of facts entitling it to relief. Conley v. Gibson, supra. It is certainly not "beyond doubt" that the CPUC decisions could hypothetically set the energy efficiency rebates and avoided costs, but that in reality the CPUC had little if any control over actual rebates and avoided costs established by the utilities. But in response to the utilities' Motion to Dismiss, Transphase did not just allege a lack of CPUC control, it filed with the District Court publicly available documents and affidavit proving total lack of control by the CPUC.[8]

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[8]See Declaration of Douglas A. Ames Accompanying Submission of Evidence on Second Prong of Midcal test, dated July 9, 1993, ¶1 to 11, and accompanying 12 exhibits (130 pages) demonstrating SCE rebate offers of $0, $100, and $200 per kw, as well as a one time offer of $600 per kw - none of which were with CPUC approval. See SDG&E 1992 DSM Annual Report (establishing variable inducement rebate plan without CPUC control). See "Demand-Side Report" (establishing that SDG&E once offered TES rebates at $300 per kw and then lowered rebate prices to $50 to $200 per kw.) See also Ames Decl., ¶12 to 19, and accompanying exhibits, showing, inter alia, SCE setting DSM

The District Court, while taking judicial notice of CPUC decisions, refused to consider Transphase's counter-evidence by converting the 12(b)(6) motion to dismiss, Fed. R.Civ.P., to a Rule 56 motion for summary judgment. App. 8a to 9a, n. 5. However, Rule 12(b) provides, in part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. (emphasis added.)

The Ninth Circuit affirmed the District Court's refusal to allow Transphase to present material pertinent if not dispositive to the issue of active regulatory control, in direct violation of Rule 12(b).

The Ninth Circuit also affirmed the District Court's violation of Federal Rule of Evidence 201(b) "Judicial Notice of Adjudicative Facts," by taking judicial notice of 300-plus pages of CPUC documents as factually determinative of CPUC control over the utilities' energy efficiency programs. As made clear in Rule 201's "Notes of Advisory Committee on 1972 Proposed Rules", subdivision (b):

With respect to judicial notice of adjudicative facts,

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avoided capacity costs at $295 per kw while simultaneously setting avoided costs for supply-side solicitations varying between $1350 and $6600 per kw, without CPUC scrutiny.

> **the tradition has been one of caution in requiring that the matter be beyond reasonable controversy..."[T]he appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both)." (quoting Professor Davis, "A System of Judicial Notice Based on Fairness and Convenience")**

Whether the utilities' energy efficiency programs were actively controlled by the CPUC was in vigorous controversy, and thus the District Court's taking of judicial notice of this fact violated Evidence Rule 201(b).

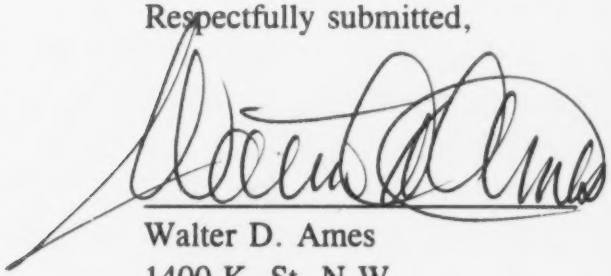
Further still, the District Court's refusal in this case to consider Transphase's material directly conflicts with the Third Circuit in Yeager's Fuel, 22 F.3d at 1272, where the District Court did convert the 12(b)(6) Motion filed by the utility to a Rule 56 Motion for Summary Judgment so that the plaintiff could submit material on Midcal's "active regulatory supervision" prong.

By deciding a genuine issue of material fact on a 12(b)(6) Motion without considering Transphase's submission of publicly available information and material, the Ninth Circuit violated Rule 12(b), Fed.R.Civ.P., Rule 201(b), Fed.R. of Evid., and set itself in conflict with the Third Circuit.

V. CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,



Walter D. Ames
1400 K. St.,N.W.
Suite 1000
Washington, D.C. 20005-2477
(202) 628-0088

September 1, 1994

Counsel for Petitioner

APPENDIX

NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

May 9, 1994

FOR THE NINTH CIRCUIT

TRANSPHASE SYSTEMS, INC.,	)	
	)	
Plaintiff-Appellant,	)No. 93-56550	
	)	
v.	)D.C. No. CV-93-	
	) 02552Kn	
	)	
SOUTHERN CALIFORNIA EDISON	)	
COMPANY; SAN DIEGO GAS &	)	O R D E R
ELECTRIC COMPANY,	)	
	)	
	)	
Defendant-Appellees.	)	
	)	

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted May 3, 1994
Pasadena, California

Before: KOZINSKI, TROTT, Circuit Judges, and WILLIAMS,*

The order of the district court dismissing Transphase

*The Honorable Spencer M. Williams, Senior United States District Judge for the Northern District of California, sitting by designation.

Systems, Inc.'s complaint for failure to state a cause of action (Federal Rule 12(b)(6)) is affirmed for the reasons given by Judge Kenyon in his order of October 7, 1993 discussing the "state action" doctrine enunciated in Parker v. Brown, 317 U.S. 341 (1943) and its progeny.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TRANSPHASE SYSTEMS, INC.,	)
	)
Plaintiff,	)
	)
v.	)CV 93-2552 Kn
	) (Ex)
SOUTHERN CALIFORNIA EDISON COMPANY and SAN DIEGO GAS & ELECTRIC COMPANY,	)
	)
Defendants.	)
	)

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

This case comes before the Court on defendants Southern California Edison Company's ("SCE") and San Diego Gas & Electric Company's ("SDG&E") Motions to Dismiss Transphase Systems, Inc.'s federal antitrust claims for failure to state a cause of action pursuant to Federal Rule 12(b)(6). Defendants allege, among other things, that Transphase's antitrust claims are barred by the "state action" doctrine and that SCE and SDG&E's participation in proceedings before the California Public Utilities Commission ("CPUC") is protected conduct under the Noerr-Pennington Doctrine. Defendant SDG&E also asserts that Transphase has failed to allege a claim under the antitrust laws because it has failed to adequately allege that the defendants were significant competitors in the relevant

product market and that their conduct created a dangerous probability that they would monopolize the market.[1] The Court agrees with all of these contentions and therefore GRANTS SCE's and SDG&E's Motions to Dismiss Transphase's antitrust claims with prejudice. The Court also dismisses Transphase's pendent state law claims under the California Unfair Practices Act and the California Cartwright Act. The Court explains its reasoning briefly in the Discussion section below.

I. INTRODUCTION

Plaintiff Transphase Systems, Inc ("Transphase") sells thermal energy storage ("TES") systems designed to shift electricity use from high demand periods (such as hot summer days) when electricity is more expensive to provide to lower demand times, typically at night. Transphase's particular TES system uses cooling tanks containing salt water that is frozen at night. Water is cooled as the tanks defrost during the day and is then circulated through a building's air conditioning system to provide cool air. Transphase's TES system is one of a variety of technologies in "demand-side management" ("DSM") which are designed to promote energy conservation and reduce the need for new power generation by shifting electricity use from high to low demand periods. DSM resources like Transphase's TES system are supposed to benefit ratepayers by offsetting the

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[1]Defendants' motions present several other arguments in favor of dismissing Transphase's complaint, including that Transphase has failed to allege any anticompetitive conduct or antitrust injury suffered by Transphase. Although these arguments are closely related to SDG&E's argument concerning the relevant product market, the Court does not directly address them.

need for utilities to build power plants or buy additional electric capacity from independent power producers at a higher unit cost than the ratepayers would need to pay for the DSM system.

Commercial electricity customers can reduce their electric bills by using Transphase's product to take advantage of lower nighttime off peak electricity rates. The drawback is that Transphase's TES technology is too expensive to make it commercially attractive; the typical commercial electric customer would find the "payback period" needed to recoup his initial capital investment to be too long to justify the initial expense of buying one of Transphase's systems. In order to remedy this problem and promote the use of energy conserving/load management technologies, the CPUC authorizes utility companies like SCE and SDG&E to provide rebates for electricity customers who utilize DSM technology. Both SCE[2] and SDG&E[3] provide such rebates for customers who decide to utilize DSM systems like that marketed by Transphase. The gist of Transphase's complaint is that SCE and SDG&E have conspired with one another and independently used their monopoly power over the energy supply in their respective service areas to hold down the rebate levels awarded to customers who utilize or

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[2]Southern California Edison is one of the largest electric utilities in the United States and distributes and sells electricity to customers within a large segment of Los Angeles County and adjacent counties.

[3]SDG&E is an electric utility based in San Diego which distributes and sells electricity within a large area of Southern California, including San Diego County and portions of Orange County.

desire to utilize DSM systems like that designed by Transphase. Plaintiffs allege that if the defendants had awarded consumers with the appropriate sized rebates, more customers would decide to buy TES systems and the value of Transphase's business would have increased by more than $50 million above its present value.

Transphase alleges two violations of Section 2 of the Sherman Act: Actual Monopolization (Comp. at ¶¶ 19-27) and Attempted Monopolization, including a conspiracy to attempt monopolization. In addition, Transphase also alleges a combination by SCE and SDG&E to restrain trade in violation of Section 1 of the Sherman Act. (Comp. at ¶¶ 40-43).

Transphase's actual monopolization claim alleges that the defendants enjoy monopoly power by "virtue of their ability to determine the prices of thermal energy storage systems and the electricity savings provided thereby to both the host customer and the DSM ratepayers." (Comp. at ¶ 20). Transphase contends that the defendants have willfully acquired and maintained their monopoly power over the "TES retrofit and DSM resources" by (1) "arbitrarily establish[ing]" rebates by refusing to consider new power plants when determining "avoided costs" and "manipulating" avoided costs; (2) controlling the amount of DSM funds to be budgeted for TES; and (3) controlling the "measuring and verifying" of whether the projected DSM savings are actually acquired. (Comp. at ¶¶ 20-22). In addition, the defendants are also accused of "actively resisting" competitive bidding between DSM and supply side options and thus preventing Transphase from competing directly against proposals to build additional generating facilities. Id. at ¶22.

Transphase's Section 1 conspiracy claim alleges that the defendants have "conspired to restrain trade by establishing artificially low rebate levels for TES" and by establishing different measurement standards for themselves than those to be applied to independent DSM suppliers. In particular, Transphase alleges that the defendant utilities have "combined and conspired to restrain commerce among the various states by deliberately adjusting their avoided costs" and "appearing together before regulatory and other bodies" to oppose joint bidding between suppliers of supply-side management (SSM) and suppliers of DSM services like Transphase. (Comp. at ¶¶ 40-43.)

II. DISCUSSION

A. State Action Doctrine

Defendants contend that Transphase's antitrust claims are totally barred by the "state action" doctrine enunciated in Parker v. Brown, 317 U.S. 341 (1943). The state action doctrine places state sponsored restraints on competition beyond the reach of the Sherman Act in order to promote the principles of federalism and state sovereignty. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S.Ct., 1344, 1349 (1991). The Supreme Court has set forth a two-pronged test for determining when actions taken by private parties, pursuant to a state regulatory regime, are immunized by the state action doctrine. First, the Court must determine whether the challenged restraint is "one clearly articulated and affirmatively expressed as state policy." Southern Motor Carriers Rate Conf. v. U.S., 471 U.S. 48, 57 (1985)(quoting Lafayette v. Louisiana Power & Light Co., 435 F.2d 389, 410 (1978). Secondly, "the State must supervise actively any private anticompetitive conduct." Southern Motor

Carriers, at 57 (citing California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)).[4] This supervision requirement is only satisfied "if state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Patrick v. Burget, 486 U.S. 94, 101 (1988).

After a thorough analysis of the complaint, the parties' briefs and documentary exhibits, the relevant sections of the California Public Utility Code, and the published opinions of the CPUC, the Court finds that both prongs of the Midcal test have been satisfied and, accordingly, holds that the defendants' allegedly anticompetitive actions are immunized by the state action doctrine.

Transphase's complaint alleges that defendants engaged in two basic anticompetitive acts: (1) failing to directly compare TES cost savings with the cost of supplying more electricity; and (2) suppressing both the total funds available for rebate subsidies and the rebate levels themselves. The CPUC decisions[5] cited by SCE and SDG&E clearly

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[4]This second prong of the Midcal test prevents the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." Southern Motor Carriers, at 57 (citing Midcal, 445 U.S. at 106).

[5]Transphase objects to the defendants' submission of and citations to these reported CPUC decision and asserts that, if the Court decides to consider these decisions, defendants' motions would be transformed into motions for summary judgment, pursuant to Rule 56. The Court disagrees. The Court may take judicial notice of these decisions under Federal Rule of Evidence

establish, however, that the form and extent of ratepayer funding for all DSM programs, including SCE's and SDG&E's, has been closely scrutinized, repeatedly modified, and ultimately approved by the CPUC.

1. California Has a "Clearly Articulated and Affirmatively Expressed" Policy to Displace Competition with Respect to DSM Bidding and the Ratemaking Process

The Court's review of the California Public Utilities Code reveals that the California legislature has clearly articulated and expressed its desire to displace competition with respect to DSM bidding and the ratesetting process. Section 747 of the Public Utilities Code sets up a legislatively mandated bidding system for demand side

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201(e) since their existence is a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(e). The Ninth Circuit held in Nugget Hydroelectric v. Pacific Gas and Electric, 981 F.2d 429, 435 (9th Cir. 1992), that a district court could take published decisions of the CPUC into account on a motion to dismiss in order to determine whether the State had "actively supervised" a defendant's allegedly anticompetitive conduct. The Nugget court ultimately found that the CPUC decision at issue, together with the applicable Guidelines, were sufficient to prove that the state actively supervised the defendant's conduct, thus satisfying the second prong of the Midcal test.

The Court therefore finds that it may properly consider the reported decisions of the CPUC in the context of the defendants' motion to dismiss. Since the Court's consideration of these decisions does not transform this into a motion for summary judgment under Rule 56, the Court DENIES Transphase's request to submit evidence on the second, "active supervision" prong of the Midcal test.

services and mandates that the CPUC should establish a pilot program of "competitive bidding auctions for demand side services." Other sections of the code, see e.g., § 701.1(c), set forth the criteria for determining the proper rebate for DSM services and prohibit the CPUC from changing any rate or altering "any classification, contract, practice, or rule as to result in a new rate, except upon a showing before the Commission and a finding by the Commission that the new rate is justified." Cal. Pub. Util. Code § 454(a). Taken as a whole, the Public Utility Code clearly articulates the state's policy of displacing competition in favor of a highly regulated system of ratesetting and bidding on alternative DSM systems.

2. The CPUC Has "Actively Supervised" SCE's and SDG&E's DSM Activities

Transphase's complaint alleges that defendants SCE and SDG&E control almost every aspect of the DSM ratesetting and bidding processes in their respective geographic markets. Transphase alleges, for example, that the defendants (1) have the power to decide whether DSM vendors like Transphase should be permitted to bid directly against supply side alternatives that can generate their own electric power (Comp. at ¶ 20); (2) determine the amount of DSM funds to be budgeted for TES systems like Transphase's (Comp. at ¶ 20); and (3) decide the ways in which "electricity savings projected from DSM technologies are measured and verified." Id. Finally, Transphase alleges that the defendant utilities "choose to conduct" the rebate programs and that "ratepayers cannot negotiate directly with Transphase, which must deal with the ratepayers through the utilities." (Comp. at ¶ 15).

The reported decisions of the CPUC and the relevant sections of the California Utilities Code clearly establish that all of these allegations are false and unsupportable as a matter of law. In fact, the CPUC, not the defendant utilities, have the sole authority to (1) decide whether DSM vendors should be permitted to bid directly against supply side alternatives[6]: (2) establish the amount of DSM funds to be budgeted for TES systems[7]; and (3) decide the ways in which electricity savings derived from DSM systems are measured and verified[8]. Moreover, the rebates provided to Transphase's customers are derived from ratepayer funds and cannot be collected or disbursed without the CPUC's explicit approval. Cal. Pub. Util. Code §§ 451, 454. Transphase's sweeping allegations about the control exercised by the defendants are thus totally unfounded. Rather, a careful review of the CPUC's published opinions clearly establishes that the Commission actively supervises every aspect of SCE and SDG&E's DSM activities attacked by Transphase's complaint.

For the preceding reasons, the Court finds that the anticompetitive actions alleged to have been committed by defendants SCE and SDG&E in Transphase's complaint are immunized from federal antitrust liability by the "state action" doctrine.

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[6]Indeed, the CPUC recently decided, after Transphase filed this complaint, to set up direct bidding between demand and supply side alternatives.

[7]See 1988 GRC at 475-477; 1992 GRC at 144.

[8]See Interim DSM Bidding Pilots at 22.

B. Defendants' Actions Are Immunized by the Noerr-Pennington Doctrine

The defendants also assert that the "anticompetitive acts" which they are alleged to have committed by Transphase's complaint are protected by the Noerr-Pennington doctrine. The Noerr-Pennington doctrine protects the right of parties to petition the government even if the impact of their position is likely to have an anti-competitive effect. Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd., 542 F.2d 1076, 1080-81 (9th Cir. 1976), cert. denied, 430 U.S. 940, at 1080 (1977) ("Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.")

As noted above, Transphase has alleged that the defendants violated Section 1 of the Sherman Act by (1) appearing together before the CPUC to take positions that would disadvantage Transphase; (2) filing joint briefs before the CPUC; and (3) speaking "in unison before [the CPUC] to demand the fruits of their monopolies." These actions are clearly protected by the Noerr-Pennington doctrine and therefore cannot form the basis for a conspiracy claim under Section 1.

Transphase's claims for monopolization and attempted monopolization under Section 2 of the Sherman Act are also protected by the Noerr-Pennington doctrine. Transphase alleges that the defendants have maintained their monopoly power by "resisting meaningful changes" to their rebate programs and resisting competitive bidding between DSM and Supply Side options. Although the complaint does not explicitly describe how defendants resisted these changes, it is clear from the context of the allegations, that the

defendants' alleged resistance was exercised by the defendants through the public positions they took in the CPUC proceedings. Thus, Transphase's claims under Section 2 of the Sherman Act are also barred by the Noerr-Pennington doctrine.

Transphase alleges in its Opposition to both SCE and SDG&E's Motions that it is relying on the "sham" exception to the Noerr-Pennington doctrine, but Transphase has failed to plead anywhere in its complaint that the defendants' conduct before the CPUC was a "sham". Thus, Transphase's complaint must be dismissed. The Ninth Circuit has held that "a complaint must include allegations of the specific activities, not protected by Noerr, which plaintiffs contend have barred their access to a governmental body." Franchise Realty, supra, 542 F.2d at 1082. Transphase has failed to meet this demanding pleading standard.

Transphase asserts in its Opposition, however, that it should be provided an opportunity to amend its complaint to allege that the defendants' actions before the CPUC were a "sham". The "sham exemption" does not appear to extend to direct lobbying efforts seeking action by an administrative body (like the CPUC), however. Franchise Realty, at 1080. Therefore, Transphase's request to amend its complaint by alleging that defendants' conduct was a "sham" would be futile.

The Court thus finds that Transphase's antitrust claims against the defendants are barred by the Noerr-Pennington doctrine.

C. Defendants SCE and SDG&E are Not Significant Competitors in the Relevant Product Market

It is axiomatic in antitrust law that a defendant may not be found liable under the Sherman Act for monopolizing or attempting or conspiring to monopolize a market unless that defendant is a competitor in the relevant market and his conduct creates a dangerous probability that he will gain a dominant share of the market. Spectrum Sports, Inc. v. McQuillan, 113 S.Ct. 884, 890-91 (1993);Mercy-Penninsula Ambulance v. County of Mateo, 791 F.2d 755, 759 (9th Cir. 1986) (county government, which performed no health care services, could not be charged with having used its market power to exclude competition when it refused to license an ambulance service because it was not a competitor in the relevant product market). Defendant SDG&E contends that it cannot be found to have violated the Sherman Act because it is not a competitor in the relevant product market and Transphase's complaint neither alleges that SDG&E is a competitor in the relevant market nor that it's conduct creates a dangerous probability that it will monopolize that market.[9]

Transphase claims that the relevant product market "over which" the utilities exercise their monopoly power are broadly speaking, DSM resources, and with specific respect to Transphase, retrofit thermal energy storage (TES) goods and services" like those supplied by plaintiff. (Comp. at ¶ 17). SDG&E asserts, however, that Transphase acknowledges in its complaint that SDG&E and SCE are not

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[9]Although SCE does not present this argument in its own motion to dismiss, the Court finds that this argument is applicable to SCE as well as SDG&E and thus dismisses Transphase's antitrust claims against SDG&E and SCE on the grounds presented in SDG&E's motion and Section C above.

really competitors in this product market; they merely exercise control over the DSM goods and services provided by others by virtue of their alleged power to control the bidding programs and rebate levels for those services. The Court agrees with SDG&E's argument and therefore GRANTS its Motion to Dismiss on these grounds.

Transphase's complaint clearly states that while SDG&E and SCE "have a monopoly over the furnishing of [DSM systems and, specifically, Transphase's TES services] to the ratepayers. . .[they] are not themselves capable of supplying those goods and services to the ratepayers, only of preventing Transphase from so doing." (Comp. at ¶ 19) (emphasis added). In another paragraph, Transphase again alleges in a conclusory fashion that the defendants have monopolies over the provision of DSM services and have "willfully maintained" these monopolies; Transphase concedes in the very next phrase, however, that the utilities "basically do nothing to supply such DSM resources to the ratepayers of California but hire others and charge large administrative costs and profits" to do so. (Comp. at ¶ 25). Transphase has also failed to allege that either SDG&E or SCE has significant market share in either the provision of DSM systems or in the TES systems marketed by Transphase.

Although the Court must assume that the allegations in a plaintiff's complaint are true when considering defendants' motion to dismiss, N.L. Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986), the Court does not "need to accept as true conclusory allegations. . .or unreasonable inferences." Schwarzer, Tashima, and Wagstaffe, Federal Civil Procedure Before Trial, § 9:221 at page 9-41. The

Court thus rejects Transphase's conclusory allegations of the defendants' market power within the relevant product market (as opposed to geographic market) since these allegations are directly contradicted by Transphase's unambiguous admission that the utilities "do nothing to supply such DSM resources to the ratepayers of California but hire others" to supply these systems. (Comp. at ¶ 25) (emphasis added). Although Transphase alleges in its Opposition that "[c]urrently, SDG&E directly provides DSM resources to its ratepayers" and that Transphase "would never intimate that the defendant utilities are incapable of hiring someone to install" TES systems (Opposition at pages 14-15), the complaint itself clearly fails to allege either that (1) SDG&E or SCE competes with Transphase in the supply of DSM or TES systems; or (2) that the defendants' current activities create a dangerous probability that they will obtain a monopoly over, or even a dominant position, in the relevant product market. Transphase's complaint therefore fails to plead an actionable claim under the federal antitrust statutes.[10]

III. CONCLUSION

For the reasons discussed above, the Court GRANTS Defendants' Motions to Dismiss Transphase's federal

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[10]If there were no independent basis for dismissing Transphase's complaint, the Court would allow plaintiff leave to amend its complaint in the event that it could, in good faith, plead that the defendants are competitors in the supply or distribution of DSM or TES systems. Given that the Court has also decided to dismiss Transphase's antitrust claims on two independent grounds, however, the Court does not grant Transphase leave to amend at this time.

antitrust claims. The Court also dismisses Transphase's pendent state law claims since all of plaintiff's federal claims have been dismissed. See Les Shockly Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989).

IT IS SO ORDERED.

DATED: October 7, 1993

/s/David V. Kenyon
DAVID V. KENYON
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

Filed Stamp

UNITED STATES COURT OF APPEALS

June 9, 1994

FOR THE NINTH CIRCUIT

TRANSPHASE SYSTEMS, INC.,	)	
	)	
Plaintiff-Appellant,	)	No. 93-56550
	)	D.C. No.
v.	)	93-02552Kn
	)	
SOUTHERN CALIFORNIA EDISON COMPANY; SAN DIEGO GAS & ELECTRIC COMPANY,	)	O R D E R
	)	
Defendant-Appellees	)	

Before: KOZINSKI, TROTT, Circuit Judges, and WILLIAMS,*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en

*The Honorable Spencer M. Williams, Senior United States District Judge for the Northern District of California, sitting by designation.

banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Additional California Statutory Provisions:

Public Utilities Code § 744.7 (1993).

Cooperative programs with customers to reduce energy bills and regulate energy quality:

(e) It is the intention of the Legislature that in reviewing and supervising programs authorized by this section, and in establishing the level of direct and indirect general ratepayer support to be used in these programs the commission shall pursue the public benefits of these programs consistent with the policies expressed in Chapter 984 of the Statutes of 1983. The Legislature further intends that the commission shall, in determining whether and to what extent direct and indirect general ratepayer support may be used in these programs, exercise its regulatory and supervisory powers to promote a competitive marketplace for energy efficiency equipment and services. The commission's findings concerning general ratepayer support of those programs, and its determination that those programs are consistent with the policies expressed in Chapter 984, shall be determinative of those issues unless found to be arbitrary and capricious. However, nothing in this subdivision is intended to affect any litigation commenced prior to July 1, 1993. Nothing in this section shall prevent the commission from utilizing a competitive bidding process for all or any part of the work to be performed under these programs.

CHAPTER 1369

CALIFORNIA STATUTES OF 1990:

An act to add Sections 746, 747, and 747.5 to the Public Utilities Code, relating to public utilities.

The people of the State of California do enact as follows:

SECTION 1. The Legislature hereby finds and declares the following:

(a) The maintenance and expansion of existing utility conservation programs, and the adoption of new conservation programs, could contribute significantly to the successful implementation of a long-term, least-cost energy plan for the citizens of California.

(b) To promote additional energy conservation measures, the Public Utilities Commission should provide an opportunity for conservation to compete on a fair and reasonable basis with generating resources to fulfill future utility resources needs.

(c) To promote additional utility financed conservation programs, the Public Utilities Commission should establish a pilot program to provide incentives for utilities to invest in conservation programs.

[Section 2 is omitted]

SEC. 3. Section 747 is added to the Public Utilities Code, to read:

§747. (a) In addition to the incentives program required by Section 746, the commission shall require one or more electric utilities to implement pilot projects to accomplish the

following:

(1) On or before June 30, 1991, begin to test separately from any generation resource bidding system the ability of demand side bidding to deliver benefits to utility customers.

(2) At the earliest practicable time, test the feasibility of an integrated bidding system that includes both generation resources and demand side programs.

(b) The commission shall establish a pilot program for gas utilities which tests a program of competitive bidding auctions for demand side services which deliver benefits to utility customers. However, a pilot program shall not apply to customer classes for which the gas utility is at risk for loss of sales or revenues due to the lack of a sales adjustment mechanism.

(c) At the earliest practicable time, the commission, in consultation with the State Energy Resources Conservation and Development Commission, shall report the results of the pilot projects required by subdivisions (a) and (b) to the Legislature. The report shall assess the feasibility and implications of implementing the tested bidding systems and shall include recommendations on whether or not the state should adopt either, or both, of the following:

(1) An integrated bidding system that allows demand side services to compete with generation resources to fulfill future electric utility resource needs, or a program of separate bidding auctions for demand side services which deliver benefits to electric utility customers.

(2) A program of separate bidding auctions for demand side services which deliver benefits to natural gas utility customers.

§454. Rate increases; Establishment of rules as to showing required to support proposed increases; Testimony by customers

(a) Except as provided in Section 454.1 and 455, no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified. Whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application to change any rate, other than a change reflecting and passing through to customers only new costs to the corporation, which do not result in changes in revenue allocation, for the services or commodities furnished by it, the corporation shall furnish to its customers affected by the proposed rate change notice of its application to the commission for approval of the new rate. This notice requirement does not apply to any rate change proposed by a corporation pursuant to an advice letter submitted to the commission in accordance with the commission procedures for this means of submission...Enacted 1951. Amended Stats. 1961, ch. 943, §1, p. 2574; Stats. 1973, ch. 1105, §1; Stats. 1974, ch 194, §1, effective April 30, 1974; Stats. 1975, ch. 518, §1; Stats. 1976, ch. 835, §1; Stats. 1984, ch. 1498, §4, effective September 27, 1984; Stats. 1988, ch. 108, §1.

Historical Derivation:

(a) Stats. 1915, ch. 91, §63, subd (a), p. 159.

(b) Stats. 1st Ex Sess 1911, ch. 14, §63, subd.(a), p. 53.

§ 701.1 Legislative findings; Inclusion of value for costs and benefits to environment in cost effectiveness calculations; Powerplant bid solicitation.

(a) The Legislature finds and declares that, in addition to other ratepayer protection objectives, a principle goal of electric and natural gas utilities' resource planning and investment shall be to minimize the cost of society to the reliable energy services that are provided by natural gas and electricity, and to improve the environment and to encourage the diversity of energy sources through improvements in energy efficiency and development of renewable energy resources, such as wind, solar, biomass, and geothermal energy.

(b) The Legislature further finds and declares that, in addition to any appropriate investments in energy production, electrical and natural gas utilities should seek to exploit all practicable and cost-effective conservation and improvements in the efficiency of energy use and distribution that offer equivalent or better system reliability, and which are not being exploited by any other entity.

(c) In calculating the cost effectiveness of energy resources, including conservation and load management options, the commission shall include, in addition to other ratepayer protection objectives, a value for any costs and benefits to the environment, including air quality. The commission shall ensure that any values it develops pursuant to this section are consistent with values developed by the State Energy Resources Conservation and Development Commission pursuant to Section 25000.1 of the Public Resources Code. However, if the commission determines that a value developed by the State Energy Resources

Conservation and Development Commission pursuant to subdivision (c) of Section 25000.1 of the Public Resources Code, the commission may nonetheless use this value if, in the appropriate records of its proceedings, it states its reasons for using the value it has selected.

[Subsections "d" through "i" omitted.]